No. 29543 -- Jasper A. Blackburn v. Workers' Compensation Division and Marrowbone Development Company

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OF WEST VIRGINIA

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Maynard, Justice, dissenting:

I have three problems with the majority opinion. First, I believe that it is incorrect in light of the facts of this case. There are two audiogram results at issue here. Mr. Blackburn was examined by Dr. Joseph Touma and underwent audiometric testing administered by Laura Bedell Garish, a certified Clinical Audiologist. The reliability of the audiogram was rated "fair to good." Based upon the examination and the results of the audiogram, Dr. Touma concluded that Mr. Blackburn had suffered a 10.65% impairment as a result of noise-induced hearing loss. Subsequently, Mr. Blackburn was examined by Dr. Sherman Hatfield and given an audiogram by Brenda D. George, a certified audiologist. The reliability of the audiogram was rated "good." Based on this examination, Dr. Hatfield recommended and the claimant ultimately received a .73% impairment award.

The uncontroverted evidence supports this award. Dr. Touma was deposed in connection with a protest, and he testified that Dr. Hatfield's audiogram revealed better thresholds than his own. Dr. Touma also testified that Dr. Hatfield's audiogram produced a

more accurate representation of Mr. Blackburn's true hearing loss impairment. Therefore, there is no expert disagreement that the most accurate audiogram was Dr. Hatfield's on which the .73% whole person impairment is based! Accordingly, this Court should have accorded proper deference to the Workers' Compensation Appeal Board decision and affirmed it.

Second, although there is precedent for the practice, and I admit I have participated in it in the past, I am nevertheless uncomfortable with this Court crafting procedural rules for the Division to follow such as those found in syllabus points 2 and 3 of the majority opinion. As set forth in footnote 15 of the majority opinion, the Health Care Advisory Panel is charged by statute to assist with the "[e]stablish[ment of] protocols and procedures for the performance of examinations or evaluations performed by physicians or medical examiners," W.Va. Code § 23-4-3b(b) (1990), and the Compensation Programs Performance Council is charged with reviewing these protocols and procedures. Even though the rules crafted by this Court are temporary, I still believe that the Court oversteps its bounds when it assumes authority statutorily granted to the Division.

Finally, I am concerned with the effect the majority opinion will have on the Workers' Compensation Fund deficit. The Workers' Compensation System in West Virginia is in deep financial trouble. In the past several weeks, a number of articles[1] have appeared in

[1]*See*, e.g., Jim Wallace, *Comp Funds A Concern For Board Officials Worry Investments Won't Cover Liability*, Charleston Daily Mail, November 15, 2002, at 2C;

local newspapers about the size of this deficit which Employment Programs Commissioner Bob Smith estimates at between 2.4 and 2.6 billion dollars.[2] In response to the question "How close are we to bankruptcy," Commissioner Smith replied, "If we didn't do anything, we'll get there."[3] I am fairly confident that the Workers' Compensation Division and the Legislature will take steps to reduce the deficit. I am hopeful but less confident that this Court will cooperate with those steps. State Senator Ed Bowman may have hit the nail on the head when he said, in regards to this Court's treatment of 1995 amendments to the workers' compensation system, "[t]hese court decisions are killing us. I have a belief right now that these court decisions have had a financially adverse effect on the fund."[4] I fear that the instant decision will only add to the ever-burgeoning workers' compensation deficit.

To be fair, the majority opinion is well reasoned and doubtless intended to ensure that the Workers' Compensation Division promulgates rules for administering audiograms in hearing loss cases in an equitable manner. If I were to view the majority opinion

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Lawrence Messina, *Workers' Comp Debt Skyrockets*, The Charleston Gazette, November 19, 2002, at 1A; and Jim Wallace, *Deficit Stuns Officials*, Charleston Daily Mail, November 19, 2002, at 1A.

[2]Jim Wallace, *Deficit Stuns Officials*, Charleston Daily Mail, November 19, 2002, at 1A.

[3]Lawrence Messina, *Workers' Comp Debt Skyrockets*, The Charleston Gazette, November 19, 2002, at 1A.

[4]Id.

in a vacuum, I may find little with which to disagree. However, I must evaluate the majority opinion in the context of how this Court will use it in reviewing workers' compensation appeals. As I have noted previously, this Court's workers' compensation jurisprudence is result driven. This is especially evidenced in its routine abuse of the rule of liberality. In a previous dissent, I wrote,

> the Court routinely abrogates legislative mandates by resorting to the so called "rule of liberality[.]". . . While arguably application of a liberality rule is warranted where the parties' evidence is evenly balanced, this Court regularly abuses the rule to find for the claimant where his or her evidence is grossly inadequate. . . .
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> According to the "Workers' Compensation Training Manual" promulgated by the Workers' Compensation Division, "[t]he Liberality Rule is something of which you should be aware. It is not something you should routinely resort to in justifying an award of benefits. In fact, citations to the rule should almost never be included in your decisions." Further, "[i]t is important to emphasize that the Liberality Rule is no substitute for proof of entitlement to workers' compensation benefits." This Court, however, routinely cites to the liberality rule and uses it to justify its decisions in workers' compensation appeals.

Martin v. Workers Compensation Div., 210 W.Va. 270, 285, 557 S.E.2d 324, 339 (2001) (Maynard, J., dissenting).

Based on *Bilbrey v. Workers' Comp. Comm'r*, 186 W.Va. 319, 412 S.E.2d 513 (1991), hearing loss cases have constituted the one type of workers' compensation appeal

where the rule of liberality could not be used by this Court as a legal justification for automatically awarding the claimant the highest impairment rating contained in the record. By abrogating the rule in *Bilbrey*, the majority opinion subjects all workers' compensation hearing loss cases appealed to this Court to the same unwarranted use of the liberality rule.[5] I fear the result will be a very significant increase in the size of awards paid in hearing loss cases regardless of whether such awards are supported by the evidence. This, in turn, can only add to the funding problems of an already greatly overburdened system. Accordingly, I dissent.

[5]While I understand that, pursuant to syllabus points 2 and 3 of the majority opinion, the liberality rule is to be used only "[u]ntil such time as the Workers' Compensation Division has promulgated additional rules for administering audiograms in workers' compensation hearing loss cases," now that *Bilbrey* is a dead letter I am convinced that this Court will continue to apply the liberality rule to hearing loss cases in perpetuity.